Supreme Court, U.S.
FILED
MAY 12 1999
CLERK

(2)

DOCKET NO. 98-1638

THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1999 TERM

****

C. W. SMITH, SMITH'S LAKE CORPORATION and

GRADY SMITH, Petitioners,

vs.

GWINNETT COUNTY, GEORGIA, Respondent.

****

On Petition for Writ of Certiorari to the

Supreme Court of Georgia

****

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

M. Van Stephens, II
Chief Assistant County Attorney
Georgia Bar No. 679950

Gwinnett County Department of Law
75 Langley Drive
Lawrenceville, Georgia 30045
(770) 822-8700

2818

TABLE OF CONTENTS AND CITED AUTHORITIES

A. TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

ARGUMENT AND CITATION OF AUTHORITY . . 17

CONCLUSION 24

B. TABLE OF CITED AUTHORITIES

CASES

C. W. Smith, Smith's Lake Corporation and Grady Smith v. Gwinnett County, Georgia Docket No. 97-709 7

Fuller v. Dillon, 220 Ga. 36 (1964). . 19

Official Code of Georgia Annotated § 23-1-7 19

Page

Lamar Advertising of South Georgia, Inc. v. City of Albany, 260 Ga. 46 (1990) 20

Nollan v. California Costal Commission, 483 U.S. 825 (107 SC 3141, 97 LE 2d 677) (1987) 20

Agins v. Tiburon, 447 U.S. 255 (100 SC 2138, 65 LE2d 106) (1980) . . 21

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985) 22

Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978) 23

Page

McDonald, Sommer and Frates v. Yolo County, 477 U.S. 340 (1986) 23

Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264 (1981) 23

Dolan v. City of Tigard, 512 U.S. 374 (1994) 24

DOCKET NO. 98-1638

THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1999 TERM

****

C. W. SMITH, SMITH'S LAKE CORPORATION and

GRADY SMITH, Petitioners,

vs.

GWINNETT COUNTY, GEORGIA, Respondent.

****

On Petition for Writ of Certiorari to the

Supreme Court of Georgia

****

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

STATEMENT OF THE CASE

Although the Petitioners seek to fashion this case as one in which Gwinnett County has taken their property for public use without just compensation, the facts of the case do not support this allegation.

This case involves an attempt by landowners to maximize the development of their property at the expense of their neighbors. The Petitioners purchased a 70- acre parcel which consists primarily of a lake, dam, and wetlands. The property has been zoned for commercial purposes for almost 30 years, but the property has never been developed. While the property may arguably have one to two acres which are developable at present, the Petitioners sought to maximize their profits by creating additional building areas in such a way as to alter the floodplain and destroy wetlands.

Immediately after purchasing the property in 1995, the Petitioners used heavy equipment to dig a hole through the dam and drain the lake. The Petitioners then channeled the lakebed in an effort to reclaim portions of

the lakebed for commercial purposes. The Petitioners filled portions of the lakebed with dirt and other material from off-site. In channeling the waters and filling portions of the lakebed, the Petitioners expanded the floodway which traverses the vast majority of the property. This expansion presented an immediate danger to the lives and property of neighbors by increasing the risk of flooding. The Petitioners also destroyed wetlands on the property without any attempt to engage in a wetlands mitigation project. The destruction of wetlands also facilitated the Petitioners' attempt to commercially develop the property.

The Petitioners destroyed mature trees in a buffer area required by local law.

A buffer is established between commercial properties and residential properties as a matter of public policy to protect mature residential areas. The Petitioners knocked down over 800 trees and graded the surface of the buffer area down approximately eight feet. The destruction of the buffer occurred in the face of the County's daily efforts to stop the destruction by issuance of citations for violations of local ordinances.

The Petitioners' actions were taken in open defiance of local, State, and Federal regulations. The Petitioners realized that if they complied with these regulations by submitting plans detailing their development activities within the floodway, wetlands, and buffer, the amount of land which could be developed for commercial purposes would be severely limited. Instead, the Petitioners refused to apply for a permit and commenced

grading activities on the site in hopes that it would be easier to get forgiveness than permission. The Petitioners' actions reflect a conscious indifference with regard to the health, safety, and welfare of their neighbors. The Petitioners' conduct was calculated to maximize the commercial potential of their property in violation of local, State, and Federal laws.

While the Petitioners seek to frame this controversy as one involving a taking of private property without just compensation, the express language of the Trial Court's Order refutes the Petitioners' position. The Trial Court's Order merely enjoined the Petitioners from engaging in construction activity on the property except for good cause shown to the Trial Court upon further hearing. Since the Petitioners refused to compile the necessary engineering reports to facilitate

the issuance of a land disturbance permit for the area, the Court required that if the Petitioners wished to further develop their property, they must submit the engineering plans, floodway authorization data, and wetlands mitigation studies to the Court to ensure that further development would not impermissibly alter the floodway or endanger the lives and property of neighboring residents. The Trial Court did not prevent the development of the property, it merely exercised equitable jurisdiction to ensure that any further development of the property would be consistent with local, State, and Federal regulations. As such, the Court's Order substantially advanced a legitimate State interest in preventing the alteration of a floodway in a mature residential area.

The facts of this case do not present an issue which is deserving of this Court's consideration. The Petitioners have previously petitioned for a Writ of Certiorari to this Court during 1997, and the Petition for Writ of Certiorari was denied. C. W. Smith, Smith's Lake Corporation and Grady Smith, v. Gwinnett County, Georgia, Docket No. 97-709. In this second Petition for Writ of Certiorari, the Smiths raise an identical takings issue and cite the same cases previously presented to this Court. In addition, the Smiths have raised this taking issue before the Trial Court and Georgia Supreme Court on three previous occasions, and the Trial Court and Georgia Supreme Court have consistently ruled that the facts presented by the Smiths do not constitute a taking of private property without just compensation.

Gwinnett County has never indicated any interest in taking or acquiring the subject property for any purpose. Instead, the Smiths have purchased a property which consists primarily of an existing lake and associated wetlands and have subsequently taken numerous actions to create an area of commercial development on top of portions of the wetlands and lakebed. In doing so, the Smiths have breached the existing dam on the property and have created a flood hazard which threatens a community's sole access to their subdivision.

While the Smiths would have this Court believe that the Gwinnett Superior Court has taken their property away from them, the Court's Orders in this case clearly indicate otherwise. After the Smiths completely ignored the discovery process, and in response to a Motion to Compel Discovery, the Smiths

and the County entered into a Consent Agreement whereby the Smiths would repair the Freeman Lake Dam after obtaining direction from a licensed engineer. The Consent Order is important in that it indicates the Smiths' agreement that the repair of the Freeman Lake Dam and the restoration of the Freeman Lake are necessary prior to any further development activities on the property. The Consent Order is also important in that it evidences the County's willingness to allow the Smiths to correct the problem which they created by breaching the dam.

It was only when the Smiths completely disregarded the Consent Order that the County filed a Motion for Contempt and sought Court intervention in the actual repair of the dam. Even then, the County had no desire to be burdened with the repairs to the Freeman Lake

Dam, and the County merely requested that the Court sanction the Smiths for failing to abide by their agreement as evidenced by the Consent Order. Many of the Smiths' actions during the pendency of the contempt proceeding, however, resulted in the Court's determination that the Smiths should not be permitted to continue construction activity on the dam. Instead, the Court ordered the County to repair the dam and restore the lake utilizing a bidding process and billing the Smiths for the cost.

While the Smiths have indicated to this Court that they were almost finished repairing the dam when the Court entered its Order, the facts of this case clearly indicate otherwise. Instead of repairing the dam, the Smiths began destroying large mature trees on the side of the property completely removed from the dam.

These trees were within a required 75-foot buffer area, and once the trees were knocked down, they could not be replaced. While knocking down the trees, the Smiths took the position that the County's Zoning Resolution concerning such buffer areas did not apply to them. When the County repeatedly served citations upon the Smiths for violation of the buffer, the Smiths literally continued knocking down trees near the officers serving the citations. The Smiths knocked down large trees within three feet of their property lines, and their actions as observed by the County's employees indicated that the Smiths believed that once the trees were knocked down, their purpose had been accomplished and County Ordinances could not defeat their development scheme.

Not only did the Smiths completely destroy large mature trees in the buffer area, the Smiths dug into the existing grade of the land to remove entire portions of the subject property to a depth of over eight feet. In doing so, the Smiths intentionally ruptured a nearby resident's sewer line leading from her home to the County's sewer main which traverses the Smiths' property. The Smiths openly contended that although the sewer line had been in place for more than twenty years, the resident did not have the right to maintain a sewer line from her property to the County's sewer main. The Smiths refused to allow County employees to repair the ruptured sewer line or enter onto the Smiths' property during a time in which sewage was overflowing in the resident's home.

It is interesting to note that the Smiths ruptured the resident's sewer line the night

before the contempt hearing on this matter. The Smiths' actions indicated to the Superior Court Judge that the Smiths were willing to openly defy the Court's Order and would continue to develop the property as they saw fit until someone physically stopped them from doing so. In fact, during the contempt hearing before the Superior Court the day after the sewer line was ruptured, Grady Smith told the Judge that the Judge could put him in jail, but the Judge could not stop him from knocking down trees on the subject property. During the contempt hearing, another witness testified that when he confronted the Smiths concerning their actions in knocking down trees within the buffer area, Grady Smith stated that he was a multimillionaire and could do whatever he wanted.

Not only did the Smiths completely obliterate the buffer required by County Zoning Ordinances, but the Smiths also destroyed large areas of wetlands surrounding the lake. The Smiths cleared over 800 trees in the area surrounding the lake, and the Smiths dug trenches in the lakebed and wetlands area which had the effect of removing waters from the wetlands on a continuous basis and channeling it into a small area of the property. The Smiths' activities violated Federal law, and the United States Environmental Protection Agency, at the urging of the United States Army Corps of Engineers, issued an Order requiring the Smiths to cease and desist from their activities, to refill the trenches, and to restore the lake and wetlands areas prior to

any further construction efforts. The Smiths completely ignored the Environmental Protection Agency's Order and continued to grade in the wetlands.

The facts of this case reveal property owners who were determined to develop their property in violation of local, State, and Federal regulations and in the face of almost daily citations. The Smiths took the position that they could develop their property as they wished, and they refused to cease development until physically forced to do so.

With regard to the Smiths' allegation that the Court's Order denies them all economically beneficial or productive uses of their property, the County submits that the present zoning of the property provides evidence to the contrary. The property is zoned C-2 Commercial and presently has an area

adjacent to the intersection of Beaver Ruin Road and Arcadia Drive where commercial development could have physically occurred prior to the Smiths' draining of the lake. The Smiths' actions after draining the lake evidence a plan to broaden this area so as to accommodate additional commercial development on the land.

The Smiths' actions were designed to decrease the size of the lake and drain portions of the surrounding wetlands. The Smiths' actions to date in broadening the area where commercial construction activity could occur refute their contention that the Court's Order deprives them of all economically beneficial uses of the land.

Since the property's zoning in the early 1970's, the County has recognized that the property can be put to commercial uses. The

County merely wishes to exercise its police power to ensure that wetlands are not inappropriately destroyed and to ensure that the floodplain is not encroached upon in violation of Federal law. The safety of those who travel daily on the County roadway directly below the dam is the County's paramount concern in this matter. The Smiths' actions in constructing a dam which by all expert accounts to date in this case is inadequate and unsafe mandated the Superior Court's action in approving the construction of a safe dam and any new development on the property.

ARGUMENT AND CITATION OF AUTHORITY

Pursuant to Rule 10, this Court does not review Petitions for Writs of Certiorari as a matter of right but grants such Petitions only

for compelling reasons. Gwinnett County respectfully submits that the Smiths' Petition for a Writ of Certiorari does not raise an important question of the type specified in Rule 10 but merely involves a property owner's attempt to develop his property without complying with local, State, and Federal development regulations. As such, the Smiths' Petition for Writ of Certiorari is inappropriate, and Gwinnett County respectfully requests that this Court deny the Smiths' Petition.

The facts of this case indicate that the Gwinnett County Superior Court was merely dealing with a local development dispute which forced the Superior Court to resort to its equitable jurisdiction. The Smiths openly defied existing Court Orders, and their actions clearly indicated that if they were

permitted to continue construction activities on the property, damage to the public health, safety, and welfare would result.

In light of this fact scenario, the Court exercised its equitable jurisdiction to ensure that when the Smiths are ready to further develop their property, they will be required to demonstrate to the Court that they have taken the proper precautions to avoid impermissibly altering the floodplain or illegally destroying wetlands. The Superior Court noted that where equity acquires jurisdiction for any purpose it will retain jurisdiction to give full and complete relief, whether legal or equitable, as to all purposes related to the subject matter. Fuller v. Dillon, 220 Ga. 36 (1964). See also Official Code of Georgia Annotated § 23-1-7. The Trial

Court took control of the property to repair the dam, restore the lake, and review and approve the Smiths future development of the property, the Trial Court's action did not work a destruction of the Defendants' private property without just and adequate compensation. Compare Lamar Advertising of South Georgia, Inc. v. City of Albany, 260 Ga. 46 (1990).

This Court has previously recognized that a valid exercise of the police power is ipso facto not a taking requiring payment of compensation. Nollan v. California Coastal Commission, 483 U.S. 825 (107 SC 3141, 97 LE 2d 677) (1987). This Court has also recognized that a governmental regulation must deny a property owner all economically viable

uses of his property in order to require payment of just compensation. See Agins v. Tiburon, 447 U.S. 255 (100 SC 2138, 65 LE2d 106) (1980). In the case at bar, the Petitioners have utterly failed to prove that they have been denied all economically viable uses of their property. To the contrary, the subject property has been zoned for commercial purposes since the early 1970's, and all parties contemplate that the property may be further developed for commercial purposes at some point in the future. Presently, however, the Smiths have violated County, State, and Federal development regulations in attempting to expand development on the property at the expense of federally protected wetlands.

Gwinnett County also asserts that the Smiths takings claim in this case is not ripe for consideration by either the Trial Court or

this Court. It is well established law that a takings claim will not be considered ripe for adjudication until the governmental entity charged with implementing the subject regulation has reached a final decision regarding its application of the regulations to the Claimant's property. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985). In the present action, the Smiths have failed to submit any develoment plan for consideration by the County, and the County has accordingly not been called upon to make a final decision regarding the application of the regulations to the Smiths' property. Since the question of ripeness is one of subject matter jurisdiction, a takings claim cannot proceed without an application for a permit to develop

the property. See, e.g., Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978); McDonald, Sommer and Frates v. Yolo County, 477 U.S. 340 (1986); Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264 (1981). Since the County's Regulation requiring a Development Permit prior to grading or excavating in a floodway or in wetlands furthers a substantial State interest in protecting water courses from siltation and in protecting surrounding property owners from an illegal expansion of the floodplain, this case should not be allow to proceed. The Trial Court appropriately exercised its equitable powers in requiring the Smiths to present engineering plans before authorizing construction activity on the property.

See Dolan v. City of Tigard, 512 U.S. 374 (1994).

CONCLUSION

Gwinnett County respectfully submits that the Superior Court's Order enjoining further construction activity except for good cause shown to the Trial Court after further hearing does not rise to the level of a controversy which merits this Court's consideration on a Petition for Writ of Certiorari. The Trial Court merely exercised its equitable powers to ensure that when the Petitioners are ready to develop their property, their development plans will be reviewed for compliance with all local, State, and Federal regulations prior to such development activity. In light

of the Petitioners' refusal to apply for or obtain development permits in the past, the Trial Court's Order is directly related to the protection of the public health, safety, and welfare by ensuring that future development will not alter the floodway in a manner which would endanger lives or property.

WHEREFORE, Gwinnett County respectfully requests that the Smiths' Petition for Writ of Certiorari be denied.

M. Van Stephens, II
Counsel of Record
Chief Assistant County Attorney
Georgia Bar No. 679950

Attorney for Respondent.

Gwinnett County Department of Law
75 Langley Drive
Lawrenceville, Georgia 30045
(770) 822-8700